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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN FUNDINGSLAND, <div style="text-align: right;">Plaintiff,</div> v. OMH HEALTHEdge HOLDINGS, INC., <div style="text-align: right;">Defendant.</div>	Case No. 15-cv-01053-BAS-WVG ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT [ECF No. 47]
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Defendant OMH Healthedge Holdings, Inc. (“OMH”) awarded Plaintiff John Fundingsland stock options as part of his employment compensation. Several years later, another company purchased a controlling interest in OMH. This transaction automatically terminated all of OMH’s outstanding stock options awards. And, because Plaintiff had never exercised his options, they were extinguished and became worthless.

As a result, Plaintiff brings this diversity action seeking relief against OMH. He argues OMH breached the parties’ contracts by not informing him of the impending transaction. The company now moves for summary judgment on Plaintiff’s remaining claims for breach of contract and breach of the implied covenant

1 of good faith and fair dealing under Delaware law. (Mot. Summ. J., ECF No. 47.)
2 Plaintiff opposes. (Opp’n, ECF No. 67.) The Court heard oral argument on the
3 motion. (ECF No. 69.)

4 Plaintiff fails to demonstrate a triable issue of fact on his breach of contract
5 claim. Nor does he show compelling issues of fairness justify this Court invoking
6 the implied covenant under Delaware law. Therefore, for the following reasons, the
7 Court **GRANTS** OMH’s motion for summary judgment.

8 9 **I. BACKGROUND**

10 **A. Plaintiff’s Stock Options**

11 Plaintiff John Fundingsland is “an executive with expertise in revenue cycle
12 management and outsourcing phone calls and business processing services in the
13 healthcare industry.” (Fundingsland Decl. ¶ 2, ECF No. 67-1.) In early 2011,
14 Plaintiff was recruited to serve as the Chief Operating Officer of OMH’s subsidiary
15 in Chennai, India. (*Id.* ¶ 3.) Plaintiff assumed this role around April 2011. (Joint
16 Statement of Undisputed Facts (“JSUF”) ¶ 1, ECF No. 55-1.) As part of Plaintiff’s
17 employment compensation, OMH granted him stock options. (*Id.* ¶ 2.)

18 OMH is a Delaware corporation. Delaware law allows a corporation to issue
19 stock options. *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 976 (Del. Ch. 2001) (citing
20 Del. Code Ann. tit. 8, § 157). “An option is a right to purchase a stock at a given
21 price.” *AT&T Corp. v. Lillis*, 953 A.2d 241, 244 n.1 (Del. 2008). The designated
22 price “is known as the *exercise price*.” *Id.* Typically, when a stock option “vests,”
23 the option holder has an immediate right to “exercise” the option and convert it into
24 stock by paying the exercise price. The option, therefore, does not automatically
25 become stock at the time of vesting; the holder must usually take an action—the
26 “exercise”—to obtain the promised shares. *See, e.g., Eluv Holdings (BVI) Ltd. v.*
27 *Dotomi, LLC*, No. CIV.A. 6894-VCP, 2013 WL 1200273, at *10 (Del. Ch. Mar. 26,
28 2013) (drawing a distinction between the vesting and actual exercise of options);

1 *Knight v. Caremark Rx, Inc.*, No. CIV.A. 1750-N, 2007 WL 143099, at *3–4 (Del.
2 Ch. Jan. 12, 2007) (interpreting a stock option provision that provided for accelerated
3 vesting upon an employee’s departure following a change in control of the entity).

4 The terms of stock options must be “set forth or incorporated by reference in
5 the instrument or instruments evidencing such . . . options.” Del. Code Ann. tit. 8, §
6 157. For Plaintiff’s stock options, the terms are contained in three interrelated
7 instruments: OMH’s 2007 Stock Incentive Plan, the Stock Option Award Agreement,
8 and a Notice of Stock Option Award. (JSUF ¶ 2.) The Court will examine each item
9 in turn.

10 11 **1. Stock Plan**

12 To promote the success of OMH, the 2007 Stock Incentive Plan (“Stock Plan”)
13 establishes a framework for the company to award stock options to its employees,
14 directors, and consultants. (Stock Plan § 1, Pugh Decl. Ex. 1, ECF No. 47-3 at 4.) A
15 person who receives an award of stock options under the Stock Plan is referred to as
16 a “Grantee.” (*Id.* § 2(x).) An “Option” is defined as “an option to purchase Shares
17 pursuant to an Award Agreement granted under the Plan.” (*Id.* § 2(cc).) Plaintiff’s
18 “Award Agreement” is the second document discussed below, and the Stock Plan
19 defines this item as “the written agreement evidencing the grant of an award executed
20 by the Company and the Grantee, including any amendments thereto.” (*Id.* § 2(f).)

21 Beyond establishing a structure for OMH to award options, the Stock Plan sets
22 forth various ground rules for these awards. For example, the Plan speaks to what
23 happens upon the occurrence of a “Corporate Transaction.” A Corporate Transaction
24 includes “a merger or consolidation in which the Company is not the surviving
25 entity” and an “acquisition . . . of securities possessing more than fifty (50%) of the
26 total combined voting power of the Company’s outstanding securities” (Stock
27 Plan § 2(q).) The Plan provides that a Corporate Transaction affects awarded stock
28 options as follows:

1 (a) Termination of Award to Extent Not Assumed.

2 (i) Corporate Transaction. Effective upon the consummation
3 of a Corporate Transaction, all outstanding Awards under the Plan shall
4 terminate. However, all such Awards shall not terminate to the extent
5 they are assumed in connection with the Corporate Transaction.

6 (*Id.* § 11(a).) Relatedly, the Stock Plan grants its administrator the authority “to
7 provide for the full or partial automatic vesting and exercisability of one or more
8 outstanding unvested awards under the Plan.” (*Id.* § 11(b).) The plan administrator
9 may do so “in advance of any actual or anticipated Corporate Transaction” or “at the
10 time of the grant of an Award.” (*Id.*)

11 The Stock Plan also discusses the suspension or termination of the company’s
12 stock option program. (Stock Plan § 14.) It imbues OMH’s board of directors with
13 the power to “amend, suspend, or terminate the Plan” at “any time.” (*Id.* § 14(a).)
14 That being said, “any termination of the Plan . . . shall not affect Awards already
15 granted, and such awards shall remain in full force and effect as if the Plan had not
16 been . . . terminated[.]” (*Id.* § 14(b).)

17 Finally, the Plan provides Grantees like Plaintiff with a limited information
18 right: “The Company shall provide to each Grantee, during the period for which such
19 Grantee has one or more Awards outstanding, copies of financial statements at least
20 annually.” (Stock Plan § 19.)

21
22 **2. Option Agreement**

23 Pursuant to the Stock Plan’s framework, Plaintiff entered into a Stock Option
24 Award Agreement (“Option Agreement”) with OMH. (Option Agreement § 1, Pugh
25 Decl. Ex. 2, ECF No. 47-3 at 22.) This agreement, which is subject to the terms of
26 the Stock Plan, grants Plaintiff the stock options described in an accompanying
27 Notice of Stock Option Award. (*Id.*) The Option Agreement provides that these
28 options “shall be exercisable during [their] term in accordance with the Vesting

1 Schedule set out in the Notice and with the applicable provisions of the Plan and this
2 Option Agreement.” (*Id.* § 2(a).) Further, this agreement states Plaintiff may
3 exercise his options “only by delivery of an Exercise Notice (attached as Exhibit A)
4 which shall state the election to exercise the Option [and] the whole number of Shares
5 in respect of which the Option is being exercised[.]” (*Id.* § 2(b).)

6 7 **3. Notice of Stock Option Award**

8 The Notice of Stock Option Award details the specifics of Plaintiff’s stock
9 options. (Notice of Stock Option Award, Pugh Decl. Ex. 3, ECF No. 47-3 at 38.) It
10 provides him the option to purchase 268 shares of OMH’s common stock at an
11 exercise price of \$2,493.34 per share, for a total cost of up to \$668,215.12. (*Id.*) The
12 Notice also provides a vesting schedule for Plaintiff’s options: his right to purchase
13 the first third of the 268 shares vests on May 23, 2012; the second third vests on May
14 23, 2013; and the remainder vests on May 23, 2014. (*Id.*)

15 Pursuant to the Notice, Plaintiff’s options expire on May 23, 2021. (Notice of
16 Stock Option Award.) If Plaintiff separates from the company, however, the Notice
17 states he instead has a three-month period to choose whether to exercise those options
18 that have already vested. (*Id.*) Finally, the Notice states that if there is a “Change of
19 Control of the Company whereby a majority ownership is bought by a single investor,
20 all the stock options will vest immediately.”¹ (*Id.*)

21 In sum, the Stock Plan creates the company’s stock option program that
22 Plaintiff participated in, and it provides for the termination of any outstanding awards
23 upon a Corporate Transaction. The Option Agreement grants Plaintiff options under
24 this Plan and binds him to the Plan’s terms. Last, the Notice of Stock Option Award

25
26 ¹ To be precise, Plaintiff’s Notice of Stock Option Award references a “Change of
27 Control”—not a “Corporate Transaction.” The Notice incorporates the Stock Plan’s defined terms,
28 and the Plan has a separate definition for a “Change in Control” versus a “Corporate Transaction.”
(*See* Stock Plan § 2(i), (q).) The Change in Control definition is narrower; it means certain
transactions that occur (i) after the company has gone public or (ii) when the company is purchased
by a publicly-traded company. (*See id.* § 2(i), (hh).)

1 provides the specifics of Plaintiff's award, including the number of options, the
2 amount he needs to pay per share to exercise the options, and when his options
3 become exercisable and expire.

4
5 **B. Plaintiff's Separation from OMH**

6 "Plaintiff's employment as C.O.O. with Defendant's company in India ended
7 in about May 2012." (JSUF ¶ 6.) Thus, under the terms of his stock option award,
8 Plaintiff had only three months from his date of separation to exercise his vested
9 options.² (Notice of Stock Option Award.) However, when he separated from the
10 company, Plaintiff and OMH entered into a Separation Agreement dated May 28,
11 2012. (*Id.* ¶ 7.) The Separation Agreement extended the date for Plaintiff to exercise
12 his options as follows: "All of your stock options granted to you on May 23, 2011,
13 via Award number OMH-028, must be exercised by October 15, 2012. This clause
14 supersedes the 'Post-Termination Exercise Period' defined in [the Notice]." (Separation Agreement, Pugh Decl. Ex. 4, ECF No. 47-3 at 43.) Further, the
15 Separation Agreement notes:
16

17 If a change of control occurs prior to you exercising your options, it is
18 anticipated that the buyer will only purchase a portion of the outstanding
19 options from the management team (50% is our expectation but will be
20 up to the buyer), which you are a part of. Whatever portion the buyer
21 allows the management team to exercise is the same percentage that will
22 be used to determine the number of options you will be able to sell. None
23 of your remaining options will be extended past the change of control.

24 (*Id.*)³ The Court will refer to this provision as the "Management Team Options
25 Provision." The Separation Agreement also provides for Plaintiff to continue to work
26 for OMH as a consultant until November 30, 2012. (*Id.*)

27 ² On May 23, 2012, the first third of Plaintiff's options vested—giving him the right to
28 purchase up to 88 shares of OMH at a cost of \$2,493.34 per share. (Notice of Stock Option Award.)

³ OMH has not argued that this provision only applies to transactions that meet the narrower
definition of a "Change in Control" under the Stock Plan, as compared to those events that satisfy
the definition of a "Corporate Transaction."

1 Plaintiff asked to extend the deadline for him to exercise his options because
2 he knew there was a potential OMH would be sold. (JSUF ¶ 16.) OMH's President
3 Anurag Mehta testified that from 2011 onward, OMH was "constantly in . . . sale
4 mode," and that "it was not any secret." (*Id.* ¶ 14.) Following Plaintiff's departure
5 from OMH, then-board member Dennis Drislane testified that he would give Plaintiff
6 "the general sense that [OMH was] still in the market looking for a buyer," but not
7 "any confidential information as it relates to deals [OMH was] working on." (*Id.* ¶
8 12.) Specifically, on September 27, 2012, Plaintiff e-mailed Drislane asking about
9 the status of a pending deal. (Fundingsland Decl. ¶ 10, Ex. 1.) Drislane responded:

10 John, it appears that the deal is dead. If that's the case, we will probably
11 pull back and focus on building the company, perhaps even do an
12 acquisition. Gopi wants to wait until after we are sure the deal is dead
13 before discussing your options. I expect that will be another week or two,
I will keep you informed.

14 (*Id.*)

15 Given that Plaintiff's options were set to expire on October 15, 2012, he
16 followed up on October 4, 2012, to discuss his outstanding options. (Fundingsland
17 Decl. Ex. 1.) After talking with the other members of the board, Drislane responded
18 on October 8, 2012, stating:

19 The Board is willing to extend the execution period for 1/3 of the original
20 number of your options (90), since you worked for us for 1 year of the
21 contemplated 3-year employment period. The exercise period for these
22 90 options will be extended from October 15, 2012, to March 31, 2013.
23 We hope to have a transaction done in the first quarter, so that would
24 allow you to benefit from a transaction that is completed over the next six
25 months. Even if a transaction is not completed during this six month
period, it still would allow you to exercise your options next year with
the resulting tax implications potentially offset by a transaction that
occurs any time in 2013.

26 (*Id.*)

1 Accordingly, on October 9, 2012, Plaintiff and OMH amended the Separation
2 Agreement. (JSUF ¶ 8.) Plaintiff's number of stock options was reduced from 268
3 to 90, and the exercise date for the options was extended until March 31, 2013. (*Id.*)

4 Finally, in an amendment to the Separation Agreement dated March 29, 2013,
5 the parties further extended the exercise date for Plaintiff's stock options to
6 December 31, 2013. (JSUF ¶ 9.) By this time, Plaintiff was no longer working as a
7 consultant for OMH. (*Id.* ¶¶ 6, 27.) On April 2, 2013, Drislane told Plaintiff via e-
8 mail that "[t]he Board has approved extending your options through the end of the
9 year" and "[h]opefully we will have a transaction done by then!" (*Id.* ¶ 13.)

10 11 **C. Corporate Transaction**

12 Meanwhile, on March 27, 2013, OMH and an entity that ultimately purchased
13 the controlling interest in the company ("August 2013 Purchaser") entered into a
14 Mutual Non-Disclosure Agreement ("NDA") regarding potential business
15 relationship discussions. (JSUF ¶ 17.) The NDA restricted the use of confidential
16 information to employees, attorneys, agents, and other individuals needing to know
17 such information to facilitate the potential business arrangement. (NDA ¶ 3, Pugh
18 Decl. Ex. 8, ECF No. 47-3 at 53.)

19 On June 13, 2013, OMH and the August 2013 Purchaser entered into an
20 Exclusivity Agreement, which was expressly designated as "Confidential
21 Information" under the NDA. (JSUF ¶ 20.) The Exclusivity Agreement prohibited
22 OMH from initiating, accepting, or soliciting any offers relating to the acquisition of
23 OMH's assets or stock. (Exclusivity Agreement 1–2, Pugh Decl. Ex. 9, ECF No. 47-
24 3 at 57.) The period of the Exclusivity Agreement was subsequently extended on
25 July 31, 2013, and again on August 19, 2013. (Amendment to Exclusivity Agreement
26 1, Pugh Decl. Ex. 10, ECF No. 47-3 at 62; Amendment No. 2 to Exclusivity
27 Agreement 1, Pugh Decl. Ex. 11, ECF No. 47-3 at 65.)

1 On August 30, 2013, OMH's Board of Directors terminated the Stock Plan.
2 (JSUF ¶ 23.) On the same day, a Corporate Transaction occurred when the August
3 2013 Purchaser and OMH entered into a Series B Convertible Preferred Stock
4 Purchase Agreement ("SPA"). (*Id.* ¶ 24.) "Under Section 5.5 of the SPA, all
5 outstanding stock options were automatically terminated pursuant to the terms of the
6 Stock Option Plan." (*Id.* ¶ 25.)

7 While some of OMH's employees involved in due diligence for the Corporate
8 Transaction were aware of the pending August 2013 Transaction, CEO Natarajan
9 testified that none of OMH's active employees exercised their stock options before
10 the sale of the company. (JSUF ¶ 26.) Nor did OMH publish the "change in the
11 stock option plan . . . to the option holders." (*Id.* ¶ 44.) Further, CEO Natarajan
12 testified that employees who had stock options at the time of the sale did not receive
13 compensation related to the stock options. (*Id.* ¶ 47.)

14 15 **D. Closing and Change in Control Bonuses**

16 Although none of OMH's active employees exercised their stock options
17 before the sale, thirteen employees received "Closing and Change in Control
18 Bonuses." (JSUF ¶¶ 48–51.) CEO Natarajan stated these bonuses were "purely stay
19 bonus[es]" based on tenure and seniority in the company. (*Id.* ¶ 48.) Plaintiff,
20 however, has produced a "spreadsheet indicating that 13 of the 14 of [OMH's]
21 employees granted Closing and/or Change in Control Bonuses received bonuses in
22 an amount of 41% [of] the value of their outstanding options . . . and that 1 out of the
23 14 received a bonus that was 48% of the value of her outstanding options." (*Id.* ¶¶
24 49–50.)

25 "On October 24, 2013, [Plaintiff] reached out to [President] Mehta to inquire
26 about the status of a transaction. During that conversation, Mehta denied any sale or
27 change in control." (Fundingsland Decl. ¶ 13.) "Plaintiff testified that while he had
28 the financial capability and there was nothing preventing him from exercising the

1 stock options, he nevertheless chose not to exercise his stock options.” (JSUF ¶ 29.)
2 Plaintiff later learned of the Corporate Transaction from another person, but when he
3 again spoke with President Mehta, “Mehta told [him] that as a result of this
4 transaction, [his] options had been terminated in August 2013.” (Fundingsland Decl.
5 ¶ 15.)

6 7 **E. Procedural History**

8 In his First Amended Complaint, Plaintiff brought claims against OMH for
9 (1) breach of contract, (2) breach of the implied covenant of good faith and fair
10 dealing, and (3) fraudulent misrepresentation and concealment. (First Am. Compl.
11 ¶¶ 18–40, ECF No. 17.) The Court granted OMH’s motion to dismiss Plaintiff’s
12 concealment claim, but denied the company’s request to dismiss Plaintiff’s contract
13 claims.⁴ (ECF No. 24.) OMH now moves for summary judgment on Plaintiff’s
14 remaining claims.

15 16 **II. LEGAL STANDARD**

17 Summary judgment is appropriate under Rule 56(c) where the moving party
18 demonstrates the absence of a genuine issue of material fact and entitlement to
19 judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477
20 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law,
21 it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
22 242, 248 (1986). A dispute about a material fact is genuine if “the evidence is such
23 that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248.

24
25 ⁴ In its order on OMH’s second motion to dismiss, the Court relied upon several allegations
26 in Plaintiff’s amended pleading that are undermined by the undisputed evidence. In particular,
27 Plaintiff alleged that “other members of the management team had indeed been able to sell at least
28 fifty percent of their options to the new majority shareholder as outlined in the May 28, 2012
separation agreement”—implicating the plain language of the Management Team Options
Provision. (First Am. Compl. ¶ 17; *see also id.* ¶ 24.) However, it is undisputed that all of the
company’s outstanding options were terminated in the transaction, and none of OMH’s active
employees exercised their options before the sale of the company. (JSUF ¶¶ 25–26.)

1 A party seeking summary judgment always bears the initial burden of
2 establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.
3 The moving party can satisfy this burden in two ways: (1) by presenting evidence
4 that negates an essential element of the nonmoving party's case; or (2) by
5 demonstrating that the nonmoving party failed to make a showing sufficient to
6 establish an element essential to that party's case on which that party will bear the
7 burden of proof at trial. *Id.* at 322–23. “Disputes over irrelevant or unnecessary facts
8 will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*
9 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

10 If the moving party meets this initial burden, the nonmoving party cannot
11 defeat summary judgment merely by demonstrating “that there is some metaphysical
12 doubt as to the material facts.” *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio*
13 *Corp.*, 475 U.S. 574, 586 (1986); *see also Triton Energy Corp. v. Square D Co.*, 68
14 F.3d 1216, 1221 (9th Cir. 1995) (“The mere existence of a scintilla of evidence in
15 support of the non-moving party's position is not sufficient.”) (citing *Anderson*, 477
16 U.S. at 252). Rather, the nonmoving party must “go beyond the pleadings and by
17 ‘the depositions, answers to interrogatories, and admissions on file,’ designate
18 ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at
19 324 (quoting former Fed. R. Civ. P. 56(e)).

20 When making this determination, the court must view all inferences drawn
21 from the underlying facts in the light most favorable to the nonmoving party. *See*
22 *Matsushita*, 475 U.S. at 587. “Credibility determinations, the weighing of evidence,
23 and the drawing of legitimate inferences from the facts are jury functions, not those
24 of a judge, [when] he [or she] is ruling on a motion for summary judgment.”
25 *Anderson*, 477 U.S. at 255.

III. ANALYSIS

A. Breach of Contract

“Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages.”⁵ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. Ct. 2005). “The proper construction of any contract . . . is purely a question of law.” *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). “Contracts are to be interpreted as written, and effect must be given to their clear and unambiguous terms.” *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 983 (Del. Ch. 2010). “Contract terms themselves will be controlling when they establish the parties’ common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.” *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *accord GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012); *see also SV Inv. Partners*, 7 A.3d at 983 (“When a contract is clear on its face, the court should rely solely on the clear, literal meaning of the words contained in the contract.”).

In his First Amended Complaint, Plaintiff alleges OMH breached the Management Teams Option Provision. (First Am. Compl. ¶¶ 22–24.) OMH moves for summary judgment on this claim, arguing it did not breach this express provision. (Mot. Summ. J. 3:10–28.) In response, Plaintiff seeks to survive summary judgment based on not only this contractual obligation, but also a series of additional provisions that he did not identify in his pleading. (Opp’n 10:7–18:9; *see also* Reply 1:8–4:2.)

⁵ As determined in the Court’s order on OMH’s motion to dismiss (ECF No. 16), Delaware law applies to Plaintiff’s claims because (i) the parties invoked the state’s law in an express choice-of-law provision, and (ii) Delaware has a substantial relationship to the parties. *See Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182 (9th Cir. 2009) (“In determining the enforceability of a choice of law provision in a diversity action, a federal court applies the choice of law rules of the forum state, in this case California.”); *see also Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 462 (1992) (identifying California’s test for enforcing a contractual choice-of-law provision).

1 The Court will first address the provision raised in Plaintiff's First Amended
2 Complaint; it will then turn to whether considering Plaintiff's additional theories
3 based on other contractual obligations is appropriate.

4 5 **1. Management Team Options Provision**

6 Plaintiff argues summary judgment is inappropriate because a jury could
7 conclude OMH breached the Management Team Options provision "by denying him
8 a lump sum predicated on the value of his options." (Opp'n 16:25–18:9.) To recall,
9 this provision states, "if a change in control occurs prior to [Plaintiff] exercising [his]
10 options, . . . [w]hatever portion the buyer allows the management team to exercise is
11 the same percentage that will be used to determine the number of options [he] will
12 be able to sell." (Separation Agreement 2.)

13 Plaintiff fails to demonstrate there is a genuine issue for trial on this claim.
14 The plain language of the Management Team Options Provision promises that
15 Plaintiff "will be able to sell" the same "percentage . . . of options" as the buyer
16 "allows the management team to exercise." It is undisputed, however, that due to the
17 Corporate Transaction, "all outstanding stock options were automatically terminated
18 pursuant to the terms of the Stock Option Plan." (JSUF ¶ 25.) They were terminated
19 because the August 2013 Purchaser did not assume them in the transaction. (*See*
20 Stock Plan § 11(a)(i) (providing that unless outstanding awards are assumed in the
21 Corporate Transaction, "all outstanding Awards under the Plan shall terminate).)
22 None of OMH's "active employees exercised their stock options before the sale of"
23 the company. (*Id.* ¶ 26.) Consequently, as a matter of law, Plaintiff cannot show the
24 management team . . . exercise[d]" a "percentage" of their options, which would have
25 triggered the provision he claims the company breached. In other words, he cannot
26 demonstrate OMH breached the Management Team Options Provision. *See, e.g., SV*
27 *Inv. Partners*, 7 A.3d at 983 (providing that when the contract is clear, the court
28 "should rely solely on the clear, literal meaning of the words" it contains). And,

1 given that Plaintiff fails “to make a sufficient showing on an essential element” of
2 his breach of contract claim, summary judgment on this cause of action is warranted.
3 *See Celotex*, 477 U.S. at 323.

4 Plaintiff nevertheless tries to survive summary judgment by focusing on the
5 Closing and Change in Control Bonuses awarded to thirteen employees. (Opp’n
6 17:3–18:9.) He argues the evidence—viewed in the light most favorable to him—
7 demonstrates these bonuses were “predicated solely on the value of outstanding
8 options,” creating a triable issue of material fact on his breach of contract claim. (*Id.*
9 18:5–7.)

10 The Court is unconvinced. Even if the Closing and Change in Control Bonuses
11 were awarded based on the value of outstanding options, this interpretation does not
12 displace the fact that Plaintiff’s unexercised options were terminated under the plain
13 language of the Stock Plan. (JSUF ¶ 25.) Nor does this interpretation mean the
14 company’s management team members “exercise[d]” a percentage of their options
15 in the sale—triggering the Management Team Options Provision. (*See* Separation
16 Agreement 2.) They did not. (JSUF ¶ 26.) Simply put, Plaintiff still does not
17 demonstrate the plain language of the Management Team Options Provision was
18 breached.

19 In sum, because Plaintiff has not produced evidence demonstrating OMH
20 breached the Management Team Options Provision, OMH is entitled to judgment as
21 a matter of law on Plaintiff’s claim for breach of this obligation.

22 23 **2. Additional Contractual Provisions**

24 Beyond the Management Team Options Provision, Plaintiff seeks to rely on
25 several other portions of the parties’ agreements to serve as the “contractual
26 obligation” for a breach of contract claim. *See Spherion*, 884 A.2d at 548. These
27 are:
28

- 1 (1) The Stock Plan’s provision authorizing the plan administrator “to amend
2 the terms of any outstanding Award granted under the Plan, provided that
3 any amendment that would adversely affect the Grantee’s rights under an
4 outstanding Award shall not be made without the Grantee’s written
5 consent.” (Stock Plan § 4(c)(vii); *see also* Opp’n 10:20–24.)
- 6 (2) The Option Agreement’s requirement that “[t]he Notice, the Plan, and this
7 Option Agreement . . . may not be modified adversely to the Grantee’s
8 interest except by means of a writing signed by the Company and the
9 Grantee.” (Option Agreement § 17; *see also* Opp’n 10:24–28.)
- 10 (3) The Stock Plan’s requirement that OMH “provide to each Grantee, during
11 the period for which such Grantee has one or more Awards outstanding,
12 copies of financial statements at least annually.” (Stock Plan § 19; *see also*
13 Opp’n 15:12–15.)
- 14 (4) The Option Agreement’s specification that “[n]o Shares will be delivered
15 to the Grantee or other person pursuant to the exercise of the Option until
16 the Grantee or other person has made arrangements acceptable to the
17 Administrator for the satisfaction of applicable income tax . . . including,
18 without limitation, such other tax obligations of the Grantee incident to the
19 receipt of Shares” (Option Agreement § 2(c); *see also* Opp’n 15:18–
20 25.)
- 21 (5) The Notice of Stock Option Award’s provision that “[i]n the event of a
22 Change of Control of the Company whereby a majority ownership is
23 bought by a single investor, all the stock options will vest immediately.”
24 (Notice of Stock Option; *see also* Opp’n 16:7–24.)

25 OMH argues the Court should not consider whether Plaintiff demonstrates a triable
26 breach of contract claim based on these provisions because Plaintiff failed to identify
27 them prior to the filing of his Opposition. (Reply 1:8–4:2.)
28

1 “Where plaintiffs ‘fail[] to raise [a claim] properly in their pleadings, . . . [if]
2 they raised it in their motion for summary judgment, they should [be] allowed to
3 incorporate it by amendment under Fed. R. Civ. P. 15(b).’” *Desertrain v. City of Los*
4 *Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (alterations in original) (quoting
5 *Jackson v. Hayakawa*, 605 F.2d 1121, 1129 (9th Cir. 1979)); accord *Kaplan v. Rose*,
6 49 F.3d 1363, 1370 (9th Cir. 1994). And, “when issues are raised in opposition to a
7 motion [for] summary judgment that are outside the scope of the complaint,” the
8 district court should construe the new matter as a request to amend the pleadings
9 under Rule 15(b). *Apache Survival Coal. v. United States*, 21 F.3d 895, 910 (9th Cir.
10 1994) (citing *Jackson*, 605 F.2d at 1129); but see *La Asociacion de Trabajadores de*
11 *Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010) (noting the
12 plaintiff “may not effectively amend its Complaint by raising a new theory of
13 standing in its response to a motion for summary judgment”); *Wasco Prods., Inc. v.*
14 *Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (“Simply put, summary
15 judgment is not a procedural second chance to flesh out inadequate pleadings.”
16 (internal quotation marks omitted).)

17 Delaware law requires that a plaintiff identify an express contract provision
18 that the defendant breached to state a claim for breach of contract. *E.g.*, *Anderson v.*
19 *Wachovia Mortg. Corp.*, 497 F. Supp. 2d 572, 581 (D. Del. 2007) (citing *Wal-Mart*
20 *Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 116 (Del. 2006)). Plaintiff’s initial
21 pleading ran afoul of this requirement—he generally alleged that “Defendant
22 breached the contracts” at issue. (Compl. ¶ 20.) Consequently, the Court granted
23 OMH’s motion to dismiss this claim with leave to amend. (ECF No. 16.) Plaintiff
24 responded by amending his pleading to identify the Management Team Options
25 Provision as the basis for his claim, but he did not invoke the other express provisions
26 he now seeks to rely upon. (See First Am. Compl. ¶¶ 22, 31.)

27 Further, OMH demonstrates that Plaintiff did not identify these provisions
28 when prompted to do so in discovery. The company propounded an interrogatory

1 asking Plaintiff to “identify . . . (i) the specific provision(s) you contend were
2 breached,” but Plaintiff’s response does not identify any of the additional provisions
3 he now claims were violated. (Pl’s Resp. to Def.’s Interrogs. 14:1–25, Pugh Decl.
4 Ex. 15, ECF No. 47-3 at 85.)

5 The Court concludes Plaintiff failed to properly raise his alternative breach of
6 contract claims in his First Amended Complaint. Because he first raises them in his
7 Opposition, the Court construes the new matter as a request to amend the pleadings
8 under Rule 15(b). *See Apache Survival Coal.*, 21 F.3d at 910. Rule 15 advises that
9 “leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). “This
10 policy is ‘to be applied with extreme liberality.’” *Eminence Capital, LLC v. Aspeon,*
11 *Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting *Owens v. Kaiser Found. Health*
12 *Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). “Five factors are taken into account
13 to assess the propriety of a motion for leave to amend: bad faith, undue delay,
14 prejudice to the opposing party, futility of amendment, and whether the plaintiff has
15 previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th
16 Cir. 2004). Of these factors, prejudice to the opposing party carries the greatest
17 weight. *Aspeon, Inc.*, 316 F.3d at 1052. However, absent prejudice, a strong showing
18 of the other factors may support denying leave to amend. *See id.*

19 On balance, these factors demonstrate granting leave to amend is not
20 appropriate here. First, granting leave would prejudice OMH. Discovery is now
21 closed. The parties have completed their pre-trial disclosures, and only a potential
22 trial in this action remains. Moreover, there is no indication that the company was
23 on notice of these additional breach of contract claims. Rather, OMH filed this
24 summary judgment motion targeting the contract provision Plaintiff identified in his
25 First Amended Complaint in response to the company’s motion to dismiss.
26 Plaintiff’s pleading and his discovery response did not identify any of the additional
27 provisions. Hence, this factor indicates the Court should deny leave to amend. *See*
28 *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (“[T]he crucial factor

1 is the resulting prejudice to the opposing party.”); *see also Lockheed Martin Corp. v.*
2 *Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *Solomon v. N. Am. Life &*
3 *Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998).

4 The undue delay factor points to the same outcome. Plaintiff’s First Amended
5 Complaint was filed seventeen months before his Opposition to OMH’s motion for
6 summary judgment. The delay is also unexplainable. For instance, one of the new
7 provisions Plaintiff argues OMH breached is the requirement that the company
8 provide him with annual financial statements. But whether OMH provided Plaintiff
9 with financial statements during the years prior to this lawsuit was within Plaintiff’s
10 knowledge at the time he commenced this action. Therefore, the unwarranted delay
11 in identifying this provision supports denying leave to amend. *See Kaplan*, 49 F.3d
12 at 1370 (reasoning denial of leave was appropriate at the summary judgment stage
13 where the plaintiff was aware of two documents containing alleged false statements
14 “from the beginning of the litigation”); *see also AmerisourceBergen Corp. v.*
15 *Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (“We have held that an eight
16 month delay between the time of obtaining a relevant fact and seeking a leave to
17 amend is unreasonable.”).

18 In addition, Plaintiff has previously amended his pleading. This factor, too,
19 supports denying him leave to amend to raise several new breach of contract claims
20 that are predicated on different obligations. *See DCD Programs, Ltd. v. Leighton*,
21 833 F.2d 183, 186 (9th Cir. 1987) (providing “a district court’s discretion over
22 amendments is especially broad ‘where the court has already given a plaintiff one or
23 more opportunities to amend his complaint’” (quoting *Mir v. Fosburg*, 646 F.2d
24 342, 347 (9th Cir. 1980))).

25 Accordingly, although the Court construes the new breach of contract claims
26 raised in Plaintiff’s Opposition as a request for leave to amend his pleading, the Court
27 denies Plaintiff’s request upon consideration of the relevant factors. Overall,
28

summary judgment is appropriate on Plaintiff's first cause of action because he fails to demonstrate a triable breach of contract claim.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

OMH also moves for summary judgment on Plaintiff's claim for breach of the implied covenant of good faith and fair dealing. (Mot. Summ. J. 15:21–22:9.) The company argues it is entitled to summary judgment because Plaintiff cannot demonstrate it acted unreasonably or arbitrarily. (*Id.*) In response, Plaintiff argues OMH breached the implied covenant by, among other things, not notifying him of the impending Corporate Transaction. (Opp'n 19:7–23:28.) Ultimately, after hearing oral argument on this claim, the Court grants OMH's motion because Plaintiff fails to demonstrate the implied covenant applies in these circumstances.

1. Framework Under Delaware Law

Under Delaware law, the implied covenant of good faith and fair dealing exists in every contract. *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017). The implied covenant of good faith “is the obligation to preserve the *spirit* of the bargain.” *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 444 (Del. 2005) (quoting *Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1366 (Del. 1996)). The doctrine “is ‘best understood as a way of implying terms in the agreement,’ whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions.” *Id.* at 441 (quoting *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).

“A claim for breach of the implied covenant ‘is contractual.’” *NAMA Holdings, LLC v. Related WMC LLC*, No. CV 7934-VCL, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member*, 50 A.3d 434, 439 (Del. Ch. 2012)). Thus, “the elements of an implied covenant claim are those of a breach of contract claim: ‘a

1 specific implied contractual obligation, a breach of that obligation by the defendant,
2 and resulting damage to the plaintiff.” *Id.* (quoting *Fitzgerald v. Cantor*, No. C.A.
3 16297-NC, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)).

4 Applying the implied covenant “involves a ‘cautious enterprise.’” *Nemec v.*
5 *Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (quoting *Dunlap*, 878 A.2d at 441). The
6 doctrine is “rarely invoked successfully,” and it is subject to several constraints. *See*
7 *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009). Initially, “[t]he
8 implied covenant cannot be invoked to override the express terms of the contract.”
9 *Id.*; *see also Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14,
10 23 (Del. Ch. 1992) (“[W]here the subject at issue is expressly covered by the contract,
11 or where the contract is intentionally silent as to that subject, the implied duty to
12 perform in good faith does not come into play.”); *accord Nemec*, 991 A.2d at 1125–
13 26.

14 Further, the doctrine applies only “when the party asserting the implied
15 covenant proves that the other party has acted arbitrarily or unreasonably, thereby
16 frustrating the fruits of the bargain that the asserting party reasonably expected.”
17 *Nemec*, 991 A.2d at 1126. In making this determination, the court “must assess the
18 parties’ reasonable expectations at the time of contracting and not rewrite the contract
19 to appease a party who later wishes to rewrite a contract he now believes to have
20 been a bad deal.” *Id.* (footnote omitted). “Parties have a right to enter into good and
21 bad contracts, the law enforces both.” *Id.* “[C]ourts should be most chary about
22 implying a contractual protection when the contract easily could have been drafted
23 to expressly provide for it.” *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126,
24 146 (Del. Ch. 2009).

25 Accordingly, conducting a “quasi-reformation” to imply contract terms
26 “‘should be [a] rare and fact-intensive’ exercise, governed solely by ‘issues of
27 compelling fairness.’” *Dunlap*, 878 A.2d at 442 (alteration in original) (quoting
28 *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992

(Del. 1998)). “Only when it is clear from the writing that the contracting parties ‘would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter’ may a party invoke the covenant’s protections.” *Id.* (quoting *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986)).

2. The Implied Obligation to Notify Plaintiff of a Transaction

At the threshold, Plaintiff must demonstrate it is appropriate to invoke the implied covenant and imply a specific contractual obligation in these circumstances. At oral argument, the Court pressed Plaintiff’s counsel to identify the specific implied obligation that Plaintiff is requesting the Court imply into the parties’ agreements. (ECF No. 69.) Plaintiff’s counsel indicated that the implied requirement should be that OMH must notify Plaintiff of an impending transaction that would terminate his options. (*See id.*) Stated differently, in Plaintiff’s view, the parties’ agreements should prohibit OMH from completing a Corporate Transaction—and therefore terminating any outstanding options—without first warning Plaintiff to allow him to decide whether to then exercise his options. (*See id.*; *see also* Opp’n 21:9–11 (“It was implied that Plaintiff would be informed of an impending change in ownership of Defendant so he could decide when to exercise the stock options[.]”).)

Based on the undisputed facts, the Court will not imply this obligation for several reasons. First, “[t]he implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider[.]” *See Nemec*, 991 A.2d at 1126. Plaintiff fails to demonstrate the conduct he complains of—a transaction being completed without the company providing him notice beforehand—could not have been anticipated at the time the parties’ agreements were negotiated. And “Delaware’s implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party

1 to a contract.” *See id.* at 1128. Therefore, Plaintiff does not show the covenant
2 should protect him in these circumstances.

3 Second, as a matter of law, Plaintiff fails to show it is “clear from the writing[s]
4 that the contracting parties ‘would have agreed to proscribe’” the termination of his
5 options in a Corporate Transaction without advance notice “had they thought to
6 negotiate with respect to that matter.” *See Dunlap*, 878 A.2d at 442 (quoting
7 *Katz*, 508 A.2d at 880). Rather, the parties’ contracts point toward the opposite
8 conclusion.

9 Under the Stock Plan, option holders like Plaintiff accept the risk that a
10 Corporate Transaction will terminate any unexercised options to the detriment of the
11 option holders. They accept this risk because the Stock Plan is missing a provision
12 commonly found in instruments involving securities: an “anti-destruction” provision.
13 *See, e.g., AT&T Corp.*, 953 A.2d at 244. “‘Anti-destruction’ clauses generally ensure
14 holders of certain securities of the protection of their right of conversion in the event
15 of a merger by giving them the right to convert their securities into whatever
16 securities are to replace the stock of their company.” *Moran v. Household Int’l, Inc.*,
17 500 A.2d 1346, 1352. As an example, in *AT&T Corp.*, the option plan contained an
18 anti-destruction provision that “preserved the option holders’ ‘economic position’
19 upon the happening of certain specified events, including a merger.” 953 A.2d at
20 244. Similarly, in *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697,
21 700–01 (Del. Ch. 2004), the plaintiffs who owned stock warrants were “protected by
22 a standard ‘anti-destruction’ provision,” which allowed them to exercise their
23 warrants after a merger to receive “the shares or other securities or property” the
24 plaintiffs would have received had they exercised their warrants immediately prior
25 to the merger. As the Court of Chancery has explained, anti-destruction provisions
26 are critical for option holders:

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1 Before the advent of anti-destruction clauses, options were rendered
2 worthless if the company engaged in a transaction that destroyed the
3 underlying security, even if that underlying security was thereby
4 converted into the right to receive something else of value. It is for this
5 reason that anti-destruction clauses are included in option agreements—
to prevent opportunistic behavior by corporations that benefits
stockholders at the expense of option holders.

6 *See Lillis v. AT&T Corp.*, No. CIV.A. 717-N, 2007 WL 2110587, at *12 (Del. Ch.
7 July 20, 2007), *remanded on other grounds*, 953 A.2d 241 (Del. 2008).

8 Viewing the evidence in the light most favorable to Plaintiff, OMH engaged
9 in “opportunistic behavior” that benefited existing shareholders at the expense of
10 Plaintiff. *See Lillis*, 2007 WL 2110587, at *12. But, unlike the security agreements
11 in the cases mentioned above, the parties’ agreements do nothing to prevent the
12 destruction of OMH’s outstanding options. Instead, the Stock Plan affirmatively
13 provides for this result—Section 11(a)(i) expressly provides that all outstanding
14 options will be destroyed in a Corporate Transaction unless they are assumed in the
15 transaction. (Stock Plan § 11(a)(i).) In other words, destruction is the default
16 outcome. (*Id.*)

17 Given this provision, Plaintiff accepted the risk that so long as he chose not to
18 exercise his options, those options might be terminated in a Corporate Transaction.
19 Nothing in the agreements provides him with the right to receive advance notice of
20 this event to allow him to decide whether to then exercise his options. And it would
21 be inconsistent to imply an obligation that would require OMH to provide advance
22 notice to an option holder like Plaintiff to protect him from the consequences of the
23 express termination provision. *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*,
24 910 A.2d 1020, 1035 (Del. Ch. 2006) (noting a plaintiff “cannot use the implied
25 covenant of good faith and fair dealing to avoid the consequences of the plain
26 language of the contract”); *see also Airborne Health*, 984 A.2d at 146 (“[T]he implied
27 obligation must be consistent with the terms of the agreement as a whole.”).
28 Consequently, Plaintiff fails to demonstrate it is clear from the parties’ agreements

1 that they would have agreed to require OMH to notify him of an impending
2 transaction. *See Airborne Health*, 984 A.2d at 146 (providing that the court “should
3 be most chary about implying a contractual protection when the contract easily could
4 have been drafted to expressly provide for it”); *see also Nemec*, 991 A.2d at 1126
5 (“Parties have a right to enter into good and bad contracts, the law enforces both.”).

6 At oral argument, Plaintiff argued the Option Agreement nevertheless supports
7 the implied obligation he requests because the agreement requires the company to
8 notify him of any actions that are adverse to his interests. (ECF No. 69.) The Court
9 disagrees. The Option Agreement provides only that “[t]he Notice, the Plan, and this
10 Option Agreement . . . may not be modified adversely to the Grantee’s interest except
11 by means of a writing signed by the Company and the Grantee.” (Option Agreement
12 § 17.) That is, the Option Agreement provides that the terms of the option
13 instruments may not be changed to Plaintiff’s detriment without his consent. This
14 provision does not require that he be generally notified of impending actions that are
15 adverse to his economic interests. Further, OMH did not adversely modify any of
16 the agreements’ terms when it terminated Plaintiff’s unexercised options—the
17 company was already expressly authorized to take this action under Section 11(a)(i)
18 of the Stock Plan. Hence, the Court rejects Plaintiff’s argument that the Option
19 Agreement’s modification provision supports an implied obligation to inform
20 Plaintiff of an impending transaction. *See Dunlap*, 878 A.2d at 441 (“[O]ne generally
21 cannot base a claim for breach of the implied covenant on conduct authorized by the
22 terms of the agreement.”).

23 In addition, although some of OMH’s treatment of Plaintiff may appear
24 “unfair,” that is not the Court’s inquiry. Plaintiff’s implied covenant claim is
25 contractual, and the doctrine he invokes “is not a free-floating duty unattached to the
26 underlying legal documents.” *See Gerber*, 67 A.3d at 418. “The Court does not
27 derive implied obligations from its own notions of justice or fairness. Instead, it asks
28 what the parties themselves would have agreed to ‘had they considered the issue in

1 their original bargaining positions at the time of contracting.’” *Miller v. HCP & Co.*,
2 No. CV 2017-0291-SG, 2018 WL 656378, at *9 (Del. Ch. Feb. 1, 2018) (quoting
3 *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013, *overruled in*
4 *part on other grounds by Winshall v. Viacom Int’l, Inc.*, 76 A.3d 808 (Del. 2013)).
5 Plaintiff fails to demonstrate OMH’s conduct was unfair based on the terms of the
6 parties’ agreements. *See Miller*, 2018 WL 656378, at *9 (“‘[F]air dealing’
7 here does not imply equitable behavior. The term ‘fair’ is something of
8 a misnomer here; it simply means actions consonant ‘with the terms of the parties’
9 agreement and its purpose.’” (footnote omitted).).

10 In sum, Plaintiff does not show this case presents rare circumstances where
11 issues of compelling fairness justify invoking the implied covenant under Delaware
12 law. *See Dunlap*, 878 A.2d at 442. He fails to present any evidence to show the
13 parties could not have anticipated—at the time of contracting—that a Corporate
14 Transaction would terminate unexercised options without advance notice to the
15 option holders. Nor does Plaintiff present any evidence to demonstrate the parties
16 would have agreed—at the time of contracting—to the implied obligation upon
17 which he now seeks to rely. Consequently, he is not entitled to a quasi-reformation
18 of the parties’ agreements under Delaware law, and the Court will grant summary
19 judgment for OMH on Plaintiff’s second claim for breach of the implied covenant of
20 good faith and fair dealing.

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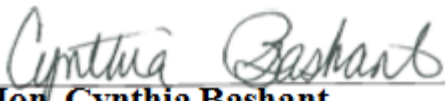
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1 **IV. CONCLUSION**

2 In light of the foregoing, the Court **GRANTS** Defendant OMH's motion for
3 summary judgment (ECF No. 47). Specifically, the Court grants summary judgment
4 in favor of Defendant on Plaintiff's remaining claims for breach of contract and
5 breach of the implied covenant of good faith and fair dealing. The Clerk of the Court
6 is directed to enter judgment accordingly and close this case.

7 **IT IS SO ORDERED.**

8
9 **DATED: July 18, 2018**


Hon. Cynthia Bashant
United States District Judge